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In The

Supreme Court of the United States

ROGER REEVES,

Petitioner,

vs.

SANDERSON PLUMBING PRODUCTS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE ALABAMA RETAIL ASSOCIATION IN SUPPORT OF RESPONDENT SANDERSON PLUMBING PRODUCTS, INC.

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STATEMENT OF INTEREST

The Alabama Retail Association files this Brief pursuant to Rule 37 and with the consent of the parties.[1] The Alabama Retail Association for over fifty years has served the interest of businesses that daily must meet the challenge of providing communities of all sizes with employment opportunities and customer service on the thinnest of profit margins. Its members, which number over 2,300, range in size from the smallest "mom and pop" operations to the nation's largest retailers. This case concerns whether our members must face the cost of defending discrimination claims through a trial by jury even when the claimant has been unable to offer substantial evidence that unlawful discrimination in fact occurred.

This industry, which has earned a well-deserved reputation for creating often the most viable employment opportunities for many senior citizens, is characterized by high turnover and wage scales that frequently are too low to attract sophisticated management at the retail outlet level. Yet Petitioner would have this Court require a jury trial any time a younger employee replaces an older one, and an unsophisticated supervisor at a rural outpost offers an inarticulate explanation for the decision. Aside from the unpredictable nature of Alabama juries, a subject with which this Court is all too familiar, the cost of defending even a single jury trial successfully can mean the difference between survival and bankruptcy – not simply for the small single outlets, but for the Woolco Division of F.W. Woolworth and other large chains. Surely the Age Discrimination in Employment Act ("ADEA") was not intended to destroy employment

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

opportunities for the very individuals that it was designed to protect.

The outcome of this case will affect every one of our members. While the ADEA and Alabama's state law equivalent (which has the same remedies as its federal counterpart) reaches only those members with twenty or more employees, the disposition of the issues facing the Court in this case will necessarily impact the disposition of claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, which reaches members with fifteen or more employees, and 42 U.S.C. § 1981, which reaches members with only one employee. Whether the discrimination laws are construed to prohibit discrimination, as the Respondent contends and as the Fifth Circuit found, or to mandate that every employer who cannot prove undisputed just cause for its decisions must justify its decisions to a jury, as Petitioner and supporting *amici* urge, is a matter of survival for our members and the employment opportunities that they provide.

STATEMENT OF THE ISSUES

1. Does the Age Discrimination in Employment Act mandate application of different principles of substantive law at the summary disposition stage than the principles of substantive law that apply at trial on the merits?

2. Does the Age Discrimination in Employment Act suspend Fed. R. Civ. P. Rule 50's mandate to consider the evidence submitted by both parties in the light most favorable to the nonmovant, and command instead that only the nonmovant's evidence may be considered?

3. Does the Age Discrimination in Employment Act suspend the identity of legal standards that apply at summary judgment and at Judgment as a Matter of Law in other civil actions, and compel a more deferential review be provided at the JMOL stage than is provided at the summary judgment stage?

STATEMENT OF THE CASE

ARA adopts Respondent's Counterstatement of the Case.

SUMMARY OF THE ARGUMENT

This case involves whether the federal discrimination laws require the disposition of federal discrimination actions to be governed by special rules that do not apply to other civil actions. Clearly, they do not. Neither the ADEA nor any other federal discrimination statute mandates a trial by jury absent substantial evidence establishing a genuine issue of fact on the ultimate issue of discrimination.

Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986), held that the same substantive law that governs the disposition of a discrimination claim at trial on the merits governs the disposition of the claim at summary judgment and at JMOL. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), held that the plaintiff seeking to establish liability for discrimination could not automatically prevail by showing that the articulated reason was false, but must go further and establish that the true reason was unlawful discrimination. *Hicks* applies at the JMOL stage because that decision contains the substantive law that defines the ultimate issue of discrimination at trial.

Petitioner's contention that the Court must ignore all but the plaintiff's evidence at the summary disposition stage also seeks to use the federal discrimination laws to impose special rules in derogation of those applicable to other civil cases. The issue at summary disposition is never whether the plaintiff's evidence alone creates a jury issue; it is whether in light of all the evidence, there exists a genuine issue for a jury to decide. To hold otherwise would require litigants, jurors, and an already overburdened court system alike to undergo the ordeal of a jury trial when there is nothing for the jury to decide.

Petitioner's call for a different standard of review at the JMOL stage than at the summary judgment stage

likewise abrogates settled rules of procedure to enable claims to reach a jury when there is nothing to decide. *Anderson* mandates that the same standard applies at both stages, and nothing in the ADEA or any other federal discrimination statute calls for a different result.

ARGUMENT

I. THE SAME SUBSTANTIVE LAW GOVERNING TRIAL OF A DISCRIMINATION CLAIM GOVERNS THE SUBSTANTIVE ELEMENTS AT SUMMARY DISPOSITION.

Settled procedural and substantive precedent support the Fifth Circuit's application at the JMOL stage of the same substantive law that governs age discrimination cases at trial on the merits. The same substantive elements, measures of evidence, and allocations of proof burdens that govern the disposition of a case on the merits at trial apply with equal force to summary disposition at summary judgment or JMOL.[2] The *McDonnell Douglas*[3] device established for moving the evidence to the ultimate issue of discrimination in a circumstantial evidence disparate treatment case does not alter the substantive law placing on the plaintiff the burden of proof on that ultimate issue at all stages of the case. The body of judicial wisdom that has developed since the advent of federal employment discrimination laws has found that case-by-case evaluation of all of the evidence on the ultimate issue better serves the administration of justice than rigid adherence to *per se* formulae. Adherence at the summary disposition stage to the same substantive law that governs trial does not require direct evidence to establish a jury question, but it does ensure that the evidence offered in any form will meet the substantive

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[2] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 316, 323 (1986).

[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972).

requirements for a dispute over discrimination that will govern the jury's disposition at trial.

The Fifth Circuit correctly applied *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), to the claim below at the JMOL stage because that decision contains the substantive law that defines the ultimate issue of discrimination at trial. Petitioner's contrary position requires adherence to a *per se* rule that *Hicks* rejects. *Hicks* forbade making the assumption at trial that evidence of a *prima facie* case plus evidence disproving the employer's articulation *per se* is sufficient to support a decision for the plaintiff. *Hicks* requires proof of a pretext for discrimination, not merely proof of pretext; "[b]ut a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, and that discrimination was the real reason." 509 U.S. at 515. The circuits[4]

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[4] Petitioner – and indeed of some of the circuits themselves – state erroneously that only two or three circuits follow *Hicks* at the summary judgment and JMOL stage. *Compare Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994) (affirming summary judgment against age and other claims, court noted that same *Hicks* burden met at trial must be met to avoid summary judgment); *Gallo v. Prudential Residential Services*, 22 F.3d 1219, 1225 (2d Cir. 1994) (though reversing summary judgment against age claim, court declared that defeating summary judgment requires plaintiff to offer evidence that "the employer's reason for discharging her is false *and* as to whether it is more likely that a discriminatory reason motivated the employer. . . . " Emphasis in original); *Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4th Cir. 1995) (affirming summary judgment against race claim, adopted same logic); *Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 370 (5th Cir. 1997) (affirming summary judgment against race and sex claims, court held that a plaintiff to survive summary judgment must "create (1) a fact issue regarding whether each of the employer's stated reasons was what actually motivated it and (2) a reasonable inference that race or sex was a determinative factor"; but court goes on to recognize that showing of pretext for discrimination, not simply pretext alone, is what *Hicks* requires); *Sullivan v. National R.R.*

declining to apply the *Hicks* requirement to the summary judgment and JMOL stages reason that the very presumption

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Passenger Corp., 170 F.3d 1056, 1061 (11th Cir. 1999) (in a case consistent with *St. Mary's*, the court reversed the denial of JMOL against a retaliation claim, expressing the pretext formulation in terms that plaintiff did not make a showing of pretext because he "failed to introduce any evidence that would have permitted the jury to legitimately draw the inference that the reasons proffered by [the employer] . . . were false ***and*** that the real reason was retaliation") (emphasis added); *Isenberg v. Knight-Ridder Newspapers, Inc.*, 97 F.3d 436 (11th Cir. 1996) (affirming summary judgment against age claim, court declared that *Hicks* should not be interpreted to make summary judgment harder); *Walker v. Nationsbank*, 53 F.3d 1548, 1557-58 (11th Cir. 1995) (affirmed JMOL against sex and age claims, finding that "the fact-finder's disbelief of the reasons the defendant offers does not compel judgment for the plaintiff.") *with Sheridan v. E.I. duPont de Nemours*, 100 F.3d 1061, 1066-67 (3d Cir. 1996) (en banc) (reversing JMOL setting aside sex verdict, court reads *Hicks* as making per se rule that plaintiff survives summary judgment by offering *prima facie* case plus evidence from which a reasonable jury can either disbelieve the articulation or believe that discrimination was more likely); *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994) (affirmed summary judgment against national origin claim, but adopted same test as *Sheridan*); *Courtney v. Biosound, Inc.*, 42 F.3d 414, 418 (7th Cir. 1994) (reversing summary judgment against age claim, adopts same logic and overruled portion of *Burdine*); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123-24 (7th Cir. 1994) (affirmed summary judgment against age claim but adopted logic identical to *Sheridan* and rejected *R.J. Reynolds*); *Gaworski v. ITT Commercial Financial*, 17 F.3d 1104, 1109 (8th Cir. 1993) (reversing JMOL against an age claim, the court followed same logic as *Sheridan*); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) (reversing summary judgment against race claim, adopted same logic as *Sheridan*); *Barbour v. Merrill*, 48 F.3d 1270, 1276-77 (D.C. Cir. 1995) (affirming denial of JMOL against race claim, adopts same logic); *Combs v. Plantation Patterns, Inc.*, 106 F.3d 1519, 1528-36 (11th Cir. 1997) (affirming summary judgment against race claim, panel offers misstatement of numerous circuits'

of liability that *Hicks* rejected at the trial stage must be applied at these earlier stages. The application of different substantive elements at these earlier stages than apply at trial not only disregards the admonition of *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986), to apply the same substantive elements at all three stages of litigation, but also ignores the consistent direction of *USPS v. Aikens*, 460 U.S. 711, 716 (1983), and *Hicks* itself, 509 U.S. at 524, that the significance of a *prima facie* case "drops from the case" when the employer offers an articulation.

Anderson, applying the constitutional malice element and the "clear and convincing evidence" proof measure to the evaluation of a summary judgment motion filed against the defamation claim of a public figure, makes clear that the same substantive elements and the same measure of proof that govern the disposition of a case at trial govern the search for issues to try at the summary judgment and JMOL stages. 477 U.S. at 254-55. *Celotex Corp. v. Catrett*, 477 U.S. 316 (1986), found summary judgment appropriate when a nonmovant asbestosis claimant offered no evidence of exposure to the defendant's product. This Court held that the party with the burden of proof on the merits at trial has the burden at the summary judgment stage of offering substantial evidence establishing a triable issue on each of the substantive elements of the claim. 477 U.S. at 323. Discrimination cases are no different. Here, as well, a claimant must meet the same substantive elements, measures of proof, and burdens of proof at the summary disposition stage as the claimant faces at trial on the merits.

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positions and analysis in dicta contrary to its own prior decisions, court at 1529 follows same logic as *Sheridan*). Some circuits are not clear. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994) (affirming JMOL against age claim, court held that mere *prima facie* case was not sufficient to raise jury issue following articulation); *see Courtney*, 42 F.3d at 421-22 (same).

Hicks held that the plaintiff seeking to establish liability for discrimination could not automatically prevail by showing that the articulated reason was false, but must go further and establish that the true reason was unlawful discrimination.[5] Circuits declining to require this showing at the summary judgment and JMOL stage reason that as *Hicks* recognized that a *prima facie* case plus evidence of the falsity of the articulation could (but need not) raise a jury issue in some cases, such evidence must support the denial of summary judgment or JMOL in all cases. This approach disregards *Anderson v. Liberty Lobby* and *Celotex*.

The substantive standards defined by *Hicks* place on the plaintiff the burden of proving both that the employer's articulated reason is false *and* that the true reason is discrimination. 509 U.S. at 519. *USPS v. Aikens*, 460 U.S. 711 (1983), makes clear that the *McDonnell Douglas prima facie* case serves only as a means for advancing the analysis to the ultimate issue, not as a means for resolving that issue.[6] 460 U.S. at 716. A *McDonnell Douglas prima facie*

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[5] Thus, the Court reversed the Eighth Circuit and reinstated a district court decision finding that the articulated reason for a halfway house supervisor's termination was false (plaintiff, but not other supervisors, received discipline for subordinate errors, and the employer provoked the final confrontation causing termination), but that the presence of two decision makers of plaintiffs' race on the discipline committee, the employer's failure to discipline subordinates of plaintiff's race for the errors for which plaintiff was disciplined, and the fact that plaintiff's termination did not affect the racial makeup of the workforce justified the conclusion that race was not the reason for termination even though the employer's articulated reasons were not the reasons either.

[6] Understandably, petitioner and supporting *amici* do not deal with the holding of *Aikens*, choosing instead either to ignore the case entirely (as does petitioner), to focus upon *Aikens* statements of the obvious – that proving discrimination does not require direct evidence, *see* Lawyers' Committee for Civil Rights Amicus Brief at 14, U.S. EEOC Amicus Brief at 20,

case plus evidence questioning the articulation's veracity raise a jury issue only when they raise a genuine issue concerning whether the reason articulated is a pretext for discrimination, not simply when the evidence raises a genuine issue concerning the articulation's truthfulness. If the *prima facie* case meets the articulation's explanation and provides an alternative discriminatory explanation, then a jury issue is presented; but not every *prima facie* case can serve as substantial evidence of this alternative at the "new level of specificity" that the post-articulation stage of the analysis represents. *See* 460 U.S. at 715. Under *Aikens*, the *prima facie* case was designed only to raise a presumption rebutted by the act of articulation.[7] *Hicks* adopts the admonition of *Aikens*, 460 U.S. at 715, that when the employer articulates, the focus shifts to the ultimate issue of discrimination,[8] and the existence or nonexistence of a *prima facie* case no longer has any magical significance.

Hispanic national Bar Ass'n. Brief at 4, or to misconstrue the decision's significance, *see* ATLA Amicus Brief at 14.

[7] "Thus, the *McDonnell Douglas* presumption places upon the defendant the burden of producing an explanation to rebut the *prima facie* case – i.e., the burden of producing evidence that the adverse employment actions were taken 'for a legitimate nondiscriminatory reason.' " 509 U.S. at 506-7. "By establishing a *prima facie* case, the plaintiff in a Title VII case creates a rebuttable 'presumption that the employer unlawfully discriminated against' him . . . [citations omitted] . . . To rebut this presumption, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.' " 460 U.S. at 714.

[8] "At this stage, the McDonnell-Burdine presumption 'drops from the case' . . . [citation omitted] and 'the factual inquiry proceeds to a new level of specificity.' " 460 U.S. at 715. " 'The district court has before it all the evidence it needs to decide' not (as the dissent would have it) whether the defendant's response is credible, but whether the defendant intentionally discriminated against the plaintiff.' " 509 U.S. at 519 *quoting* 460 U.S. at 715.

509 U.S. at 519. The offer of a *prima facie* case calls for an articulation. If the employer meets this burden, then the presumption of discrimination "drops from the case":

> Our cases make clear that at that point the shifted burden of production became irrelevant: "If the defendant carries this burden of production, the presumption raised by the *prima facie* case is rebutted," Burdine, 450 US, at 255, 67 L Ed 2d 207, 101 S.Ct. 1089, and "drops form the case," id., at 255, n 10, 67 L Ed 2d 207, 101 S.Ct. 1089. The plaintiff then has "the full and fair opportunity to demonstrate," through presentation of his own case and through cross-examination of the defendant's witnesses, "that the proffered reason was not the true reason for the employment decision," id. at 256, 67 L.Ed. 2d 207, 101 S.Ct. 1089, and that [age] was. He retains the "ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination." Ibid.

Hicks, 509 U.S. at 507.

The act of articulation (veracity at this point is not in issue[9]) focuses the inquiry on the ultimate issue – whether the employer was motivated by unlawful discrimination or not. 509 U.S. at 509, 519. The employee, however, retains the ultimate burden of proving NOT that the articulation is false, but that discrimination is the true reason for the challenged action.[10] Making a *per se* jury issue out of a *prima facie* case plus evidence attacking the articulation's truthfulness changes the *prima facie* case

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[9] 509 U.S. at 518; 460 U.S. at 715.

[10] *See* 509 U.S. at 508; *compare Texas Department of Community Affairs v. Burdine*, 405 U.S. 248, 253 (1981) ("[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.") *with Federal Rule of Evidence 301* (A presumption requires rebuttal; it does not shift the burden of proof).

from a presumption shifting the burden of going forward by calling for articulation to a presumption shifting the burden of proof calling for an affirmative defense. It reattaches to the *prima facie* case a significance that *Aikens* removed,[11] and accords the *prima facie* case a function that *Aikens* and *Hicks* rejected. *See* 509 U.S. at 519; 460 U.S. at 716. The petitioner should be required to prove his case – not simply offer evidence that the employer's explanation may be false without evidence that the true reason is age discrimination. *See* 509 U.S. at 519.

In addition to ignoring *Aikens*, this approach is disingenuous in that it uses *Hicks* – a decision rejecting *per se* liability rules – to impose one. *See* 509 U.S. at 519. "The analysis of the ultimate question should not be befouled or misdirected by judicial presumption." ATLA Amicus Brief at 26. Numerous decisions make clear that the evaluation of the evidence of discrimination in each case, not the mechanistic application of a per se *McDonnell Douglas* formula, offers the best means for resolving the ultimate issue of discrimination.[12] The position of petitioner and of the circuits supporting this view seek to impose such a *per se* rule – a rule that a *prima facie* case plus evidence questioning the articulation's veracity ALWAYS creates a jury issue.

The Circuits that support this "no evidence of discrimination needed" mentality often quote the following portion from *Hicks* in support of their holding: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) ***may***, together with the elements

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[11] *See* Aikens, 460 U.S. at 716 ("[N]one of this means that the trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.").

[12] *Hicks*, 509 U.S. at 519; *Aikens*, 460 U.S. at 715; *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978).

of the *prima facie* case, suffice to show intentional discrimination."[13] They rely upon the very language that rejects the per se rule that they seek to impose.[14]

The question in *Hicks* was whether the *employee* was entitled to judgment if the employee presented evidence to show that employer's proffered reasons were false. This Court held that compelling judgment for the plaintiff in this situation "disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.' " *Hicks*, 509 U.S. at 511. Further, this Court stated "that (1) the plaintiff must show *'both* that the reason was false, *and* that discrimination was the real

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[13] 509 U.S. at 511 (emphasis added); *see Combs v. Plantation Patterns, Inc.*, 106 F.3d 1519, 1528-29 (11th Cir. 1997); *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995); *Courtney v. Biosound*, 42 F.3d 414, 418 (7th Cir. 1994); *Fuentes v. Perskie*, 32 F.3d 759, 763-65 (3rd Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *see also*, Petitioner's Brief at 24.

[14] Contrary to Petitioner's contention, Petitioner's Brief at 27-28, the application of *Hicks* at the summary disposition stage does not impose a per se rule requiring the grant of summary disposition in any case in which the plaintiff offers a *prima facie* case plus evidence challenging the articulation; it **prevents** the imposition of a contrary per se rule. As quoted above, such evidence "***may***, together with the elements of the *prima facie* case, suffice to show intentional discrimination." 509 U.S. at 511 (emphasis added). *Burdine* and *Hicks* anticipate that the evidence comprising the *prima facie* case still must be considered along with the rest of the evidence. 450 U.S. at 255 n.10, *see* 509 U.S. at 511. *Hicks* simply forecloses any suggestion that such evidence will always be sufficient to raise a jury issue concerning whether the true reason for employment action was discrimination. *Hicks* makes clear that "may" means "may" in the substantive law governing the evaluation of the ultimate issue of discrimination, and *Anderson* makes clear that if "may" means "may" at trial on the merits, "may" means "may" at the summary disposition stage.

reason,' and (2) 'it is not enough . . . to *dis*believe the employer . . . ' Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*" *Hicks*, 509 U.S. at n. 4, 518, 519.

The disbelief of the articulation is not the same as a finding of discrimination. *Burdine* made clear that a *McDonnell Douglas prima facie* case did not shift to the defendant the burden of disproving discrimination, *Aikens* made clear that a *prima facie* case has no independent significance once the defendant has articulated, and *Hicks* made clear that mere proof of a *prima facie* case plus proof that the articulation is false did not automatically mean that the plaintiff had proved discrimination. The act of articulation rebuts the presumption raised by the *prima facie* case. Questions about the truth of the articulation necessarily must be raised to establish a jury issue of pretext, but questions about its truthfulness are not *per se* sufficient to raise a jury issue concerning pretext for discrimination in all cases. *Hicks* held that "Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of (in the context of the present case) race." 509 U.S. at 523-24.

Circuits equating a disbelieved articulation with a jury issue of pretext rely upon a portion of *Burdine* that *Hicks* squarely rejected.[15] Although the *Hicks* majority specifically noted that this language from *Burdine* was

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[15] *See Combs v. Plantation Patterns, Inc.*, 106 F.3d 1519, 1528 (11th Cir. 1997); *Courtney v. Biosound, Inc.*, 42 F.3d 414, 418-19 (7th Cir. 1994); *Fuentes v. Perskie*, 32 F.3d 759, 765 (3rd Cir. 1994); *see also*, Petitioner's Brief at 25-26. Some *amici* also mistakenly equate an issue over the articulation's believability, which *Hicks* makes clear is not sufficient in all cases, with the employer's awareness of the articulation, which *McKennon v. Nashville Banner*, 513 U.S. 352 (1995), makes clear is a different issue entirely.

inconsistent with its holding, 509 U.S. at 517, 519, virtually every circuit to confine the *Hicks* test to the trial stage quotes the *Burdine* language in 450 U.S. at 256 as though *Hicks* had never been decided.[16] The Court in *Hicks* observed that "nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination the much different findings that the employer's explanation of its action was not believable." 509 U.S. at 514-15. *Hicks* thus effectively overruled *Burdine*'s method of proving pretext simply by showing that the articulation was not worthy of belief.[17] This substantive change applies with equal force to the summary disposition of discrimination cases.

The Fifth Circuit's approach below remains true to the substantive and procedural decisions to which this Court has adhered in the past. Just as the *Hicks* interpretation of *Burdine* created problems with only one sentence, the Fifth Circuit interpretation of *Hicks* below offers far fewer problems than would the contrived creation urged by the petitioner. To adopt the same standard at JMOL as *Hicks* requires at trial serves the letter and spirit of *Anderson* by maintaining the consistency of elements on the merits at all stages of the proceeding, 477 U.S. at 255, serves the letter and spirit of *Aikens* by focusing upon the ultimate issue, 460 U.S. at 715, serves

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[16] *See Combs v. Plantation Patterns, Inc.*, 106 F.3d 1519, 1528, 1536 (11th Cir. 1997); *Fuentes v. Perskie*, 32 F.3d 764-65 (3rd Cir. 1994); *Gaworski v. ITT Commercial Financial*, 17 F.3d 1104, 1109 (8th Cir. 1993).

[17] *Hicks* reversed the Eighth Circuit's rejection of the district court's conclusion that, although the articulated reasons were not the true reasons for the plaintiff's termination, the plaintiff had failed to establish that race was the reason. "[T]hat the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of . . . [discrimination] is correct." *St. Mary's*, 509 U.S. at 524.

the letter and spirit of *Hicks* by requiring evidence of pretext for discrimination (and not just pretext), 509 U.S. at 515, and serves the letter and spirit of the law by not converting a discrimination prohibition into a just cause provision. *See* 509 U.S. at 523.

Adopting the Fifth Circuit's position has no down side. Petitioner's parade of horribles is illusory. *See* petitioner's brief at 23.[18] Applying *Hicks* at the summary

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[18] Contrary to petitioner's assertion at page 23 of his brief, some of the commentators he cites **do not** argue that direct evidence is required to defeat summary judgment in discrimination cases, and recognize that in cases involving direct evidence, summary judgment is not even a relevant consideration. *See* Frank J. Caviliere, *The Recent Respectability of Summary Judgments and Directed Verdicts in Intentional Age Discrimination Cases; ADEA Analysis Through the Supreme Court Summary Judgment Prism*, 41 Clev.St.L.Rev. 103, 144 (1993) ("While 'smoking gun' evidence is not required, it has never hurt the plaintiff's case. By invoking direct evidence of age animus, a dual motive situation may arise, effectively insulating the case from summary judgment and directed verdict."). Contrary to the petitioner's argument, another commentator cited by petitioner observes that "it is not settled law that the same standard applies in ruling on a motion for summary judgment as applies on a Rule 50 motion." Robert J. Gregory, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 Fla.St.U.L.Rev. 689, 702 (1996). Other commentators cited by petitioner simply repudiate the *Anderson/Celotex/Matsushita* trilogy, characterize *Hicks* as wrong, and urge a standard for summary judgment in discrimination cases that would require employers to establish "just cause" for every challenged decision. *See* William R. Corbett, *The "Fall" of Summers, the Rise of "Pretext Plus" and the Escalating Subordination of Federal Employment Discrimination Law for Employment at Will: Lessons from McKennon and Hicks*, 30 Ga.L.Rev. 305, 312, 352 (1996) (Polemic attacking employment at will as an illegitimate concept in the common law and the product of influence asserted by those in society with "power, property and prerogative"; "the [Supreme] Court values

disposition stage does not require that petitioner produce direct evidence in order to show pretext. Indeed, the seminal Second Circuit decision applying *Hicks* at the summary disposition stage **denied** summary judgment under the *Hicks* standard. *Gallo v. Prudential Residential Services*, 22 F.3d 1219, 1225 (**2d** Cir. 1994) (reversing summary judgment against age claim). *Hicks* does not require direct evidence; *Hicks* simply requires creation of a jury issue on the ultimate issue of the case – the presence or absence of unlawful discrimination – by proof that the employer's articulated reason is not simply wrong, but hiding a discriminatory motive. Moreover, it is fair to say that *Hicks* would **never** involve direct evidence. While an employee could establish a jury issue either with direct evidence or using other models,[19] the *Hicks* analysis presupposes the circumstantial evidence context.

This case is not about direct evidence. Direct evidence of discrimination is evidence that establishes discriminatory intent without the need to make an

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employment at will more highly than employment discrimination law and its underlying policies."); Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 Cornell L. Rev. 325 (1995) (Arguing that any restraint on a jury, e.g., summary judgment, JMOL, renewed JMOL, is the unjust product of "a power struggle along gender and racial lines."); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C.L.Rev. 203, 256 ("[C]ourts should require a defendant moving for summary judgment to prove more than a defendant in an ordinary civil case before the burden is shifted to the plaintiff to show that a genuine issue of material fact exists as to whether the defendant's alleged reason for its employment decision is pretextual."). These novel arguments, if accepted, would place any employment discrimination case in a separate category, virtually insulated from application of Rule 56, with the result being that all such cases will proceed to a jury trial.

[19] *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989).

inference.[20] This case is about whether the principles of substantive discrimination law espoused in *Hicks* apply

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[20] *Fernandes v. Costa Brothers Masonry, Inc.*, 1999 WL 1252868, *8 (1st Cir. 1999) (opinion gives great review of law in every circuit; then court declares that "a statement that plausibly can be interpreted two different ways – one discriminatory and the other benign – does not directly reflect illegal animus and, thus, does not constitute **direct evidence**."); *Carey v. Mt. Desert Island Hospital*, 156 F.3d 31, 42 fn. 2 (1st Cir. 1998) ("**Direct evidence** is often said to be the 'evidentiary equivalent of a smoking gun.' "); *Raskin v. Wyatt Co.*, 125 F.3d 55, 61 (2nd Cir. 1997) ("In short, to warrant a mixed-motive burden shift, the plaintiff must be able to produce a 'smoking gun' or at least a 'thick cloud of smoke' to support his allegations of discriminatory treatment."); *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2nd Cir. 1997) (Application of *Price Waterhouse* is triggered by "conduct or statements by person *involved in the decision making process* that may be viewed as directly reflecting the alleged discriminatory attitude."); *Connors v. Chrysler Financial Corp.*, 160 F.3d 971, 976 (3rd Cir. 1998) ("Under the standard announced by Justice O'Connor's controlling opinion in *Price Waterhouse v. Hopkins*, the evidence must be such that it demonstrates that the decision makers placed substantial negative reliance on an illegitimate criterion in reaching their decision . . . To succeed, the **direct evidence** must be 'so revealing of discriminatory animus that it is not necessary to rely on any presumption from the *prima facie* case to shift the burden of production.' "); *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) ("A plaintiff qualifies for the more advantageous standard of liability applicable in mixed-motive cases if the plaintiff presents '**direct evidence** that decision makers placed substantial negative reliance on an illegitimate criterion' . . . Such a showing requires 'evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.' "); *Haas v. ADVO Systems, Inc.*, 168 F.3d 732, 734 n.2 (5th Cir. 1999) (**direct evidence** of discrimination is that which shows that the employer in question " 'actually relied on [the forbidden factor] in making its decision.' "); *Bodenheimer v. PPG Indus. Inc.*, 5 F.3d 955, 958 (5th Cir. 1993) (**Direct evidence** cases

only to the disposition of a discrimination case at trial on the merits, or whether they apply at the summary judgment and JMOL stages as well. Those principles require proof of discrimination in order to prevail, 509 U.S. at 530-31, not proof of discrimination without inference.[21]

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are those in which the evidence would serve to prove unlawful discrimination "without any inferences or presumptions."); *Nemet v. First National Bank of Ohio*, 1999 WL 1111584, *4 (6th Cir. 1999) (**Direct evidence** of age discrimination is evidence that shows that the person that made the challenged decision, or was otherwise meaningfully involved in that decision, had an age bias or the bias affected the challenged decision. Citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989)); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044 (7th Cir. 1999) ("**Direct evidence**" is "evidence which in and of itself suggests that someone with managerial authority was 'animated by an illegal employment criterion.' "); *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1017 (8th Cir. 1999) ("**Direct evidence** is evidence of conduct or statements by persons involved in the decision making process that is sufficient for a factfinder to find that a discriminatory attitude was more likely than not a motivating factor in the employer's decision."); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998) ("**Direct evidence** is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption."); *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999); *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999) ("We have defined **direct evidence** of discrimination as evidence which reflects 'a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee.' "); *Thomas v. National Football League Players Ass'n*, 131 F.3d 198, 204 (D.C. Cir. 1997) ("In context, the notion of '**direct' evidence** in Justice O'Connor's concurrence means only that the evidence marshaled in support of the substantiality of the discriminatory motive must actually relate to the question of discrimination in the particular employment decision, not to the mere existence of other, potentially unrelated, forms of discrimination in the workplace.")

[21] *Walton v. McDonnell Douglas Corp.*, 167 F.3d 423, 426 (8th Cir. 1999) ("Not all comments that may reflect a discriminatory attitude are sufficiently related to the adverse employment action in question to support such an inference.").

The conclusion that the same principles of substantive law apply at all stages of a discrimination case, as is the rule for the substantive law governing every other kind of case, does not require the petitioner to produce direct evidence in order to reach the jury. This conclusion merely requires that the discrimination plaintiff, like every other plaintiff, raise a triable issue of fact on the evidence as evaluated under the same substantive law that would guide the jury if the case were submitted.

The petitioner's contrary view changes the nature of discrimination law. It changes the substance of discrimination law. Changing the discrimination laws from negative prohibitions against using certain reasons for employment decisions to affirmative obligations requiring an employer accused of discrimination to justify its decision by offering evidence of a just cause contradicts the law of even the circuits declining to follow *Hicks*.[22] It changes the procedural law. Creating a per se rule that a plaintiff always defeats summary judgment and JMOL with a *McDonnell Douglas prima facie* case plus evidence that the articulated reason is false imposes a different substantive burden at summary judgment or JMOL than at trial, transforms a device for identifying articulation

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[22] This is true not only of the Fifth Circuit, *Megill v. Board of Regents*, 541 F.2d 1073, 1077 (5th Cir. 1976), which follows *Hicks* at the JMOL stage, and the Eleventh Circuit, *see Nix v. WLCY Radio/Rahall Communications, Inc.*, 738 F.2d 1181, 1186-87 (11th Cir. 1984), which is split on the issue, but also of the Third Circuit, *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994), and the Eighth Circuit, *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1109 (8th Cir. 1994), which do not follow *Hicks* at that stage. Thus, the issue is not whether an employer must prove "just cause" to defend an employment decision under Mississippi state law, Petitioner's Brief at 28 n.19, but whether the employer must prove just cause to defend an employment decision under the federal discrimination statutes.

into a device for averting summary disposition, and changes the inquiry from "whether the defendant intentionally discriminated against the plaintiff" to "whether the defendant's response is credible" – precisely the opposite of what the law requires. *See* 509 U.S. at 519, 460 U.S. at 715; *see also*, 477 U.S. at 255.

Neither the ADEA (at issue here) nor any other federal discrimination statute was intended to create a just cause for employment action standard in the substantive law governing employment decisions. Neither the ADEA nor any other federal discrimination statute was intended to modify the procedural rules governing the evaluation of the evidence. Accordingly, the decision of the Fifth Circuit below is due to be affirmed.

II. APPLYING *HICKS* AT SUMMARY DISPOSITION REQUIRES CONSIDERING ALL RECORD EVIDENCE.

Petitioner argues that, when reviewing a lower court's grant or denial of a motion for judgment as a matter of law (i.e., directed verdict), an appellate court 1) cannot look at all of the evidence, and 2) must give some deference to the lower court's decision. Thus, according to petitioner, the Court of Appeals erred when it reviewed *all* of the evidence and applied a *de novo* standard of review. Therefore, as petitioner's argument goes, the Court of Appeals' decision that the trial court should have granted respondent's motion for judgment as a matter of law is due to be reversed and the jury verdict upheld. Petitioner also asserts that there is a split of authority among the Circuits on the issues of what evidence to look at and what standard of review to apply.

Petitioner is wrong on all three of his major points. While petitioner attempts to support his arguments by referring to this Court's opinion in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), petitioner has misinterpreted that opinion and ignored its progeny. Indeed, with the exception of *Anderson*, every case relied on by

petitioner to support this particular argument was decided years, or even decades, before *Anderson*. It is only by citing cases which predate *Anderson* that petitioner is able to create the appearance of a split of authority among the Circuits as to the proper standard of review in the instant case. From there, of course, petitioner argues the court below erred by not applying the standard most favorable to him.

Whatever the situation prior to this Court's opinion in *Anderson*, it is clear from a review of *Anderson* and its progeny that this Court and the Circuit Courts of Appeals unanimously have held directly contrary to what petitioner claims is the correct result here. Petitioner argues that review of a trial court's decision on a motion for judgment as a matter of law is something more deferential than *de novo* review. However, every Circuit Court of Appeals has held that such review is, in fact, *de novo*.[23]

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[23] *See, e.g., Aetna Cas. & Sur. Co. v. P&B Autobody*, 43 F.3d 1546, 1556 (1st Cir. 1994) (stating that "denial of judgment as a matter of law is 'reviewed *de novo*' "); *Piesco v. Koch*, 12 F.3d 332, 340 (2nd Cir. 1993) (noting that court reviewing a grant or denial of a motion for judgment as a matter of law applies same standard, and performs same function as the trial court in determining whether to grant the motion in the first instance.); *Lightning Lube, Inc. v. Whitco Corp.*, 4 F.3d 1153, 1166 (3rd Cir. 1993) (stating "[w]e exercise plenary review of an order granting or denying a motion for judgment as a matter of law and apply the same standard as the district court"); *Scheduled Airlines Traffic Offices, Inc. v. Objective, Inc.*, 180 F.3d 583, 588 (4th Cir. 1999) (stating "[w]e review a district court's grant of judgment as a matter of law *de novo*"); *Aetna Cas. & Sur. Co. v. Pendleton Detectives of Mississippi, Inc.*, 182 F.3d 376, 377 (5th Cir. 1999) (stating "[w]e review the district court's grant of a motion for judgment as a matter of law *de novo*, applying the same standard it used"); *Snyder v. AG Trucking, Inc.*, 57 F.3d 484, 490 (6th Cir. 1995) (stating "[w]e review a judgment as a matter of law *de novo*"); *Klunk v. County of St. Joseph*, 170 F.3d 772, 775 (7th Cir. 1999) (stating "[j]udgments as a matter of law are reviewed by appellate courts in the same fashion as summary judgment

Similarly, petitioner argues that the Circuits have split over what evidence should be looked at when reviewing a district court's decision on a motion for judgment as a matter of law. Based on this perceived split, petitioner argues that the correct position is that only the evidence which supports his case should be considered on appeal for purposes of determining whether the trial court's ruling on motion for judgment as a matter of law was correct. As with the issue of *de novo* review, all of the circuits are unanimously contrary to petitioner's position. Based primarily on this Court's decision in *Anderson*, the Circuit Courts of Appeals each hold that all evidence is to be considered when determining the propriety of a grant or denial of judgment as a matter of law.[24]

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motions. *Anderson v. Liberty Lobby, Inc.*, . . . We review the conclusions of the district court *de novo* . . . "); *Steckstor v. Hancock*, 984 F.2d 274, 276 (8th Cir. 1993) (stating "[b]ecause the district court's granting a directed verdict is necessarily a pure question of law, we review its propriety de novo"); *Pierce v. Multnomah County, Oregon*, 76 F.3d 1032, 1037 (9th Cir. 1996) (stating "[w]e review *de novo* the grant of a directed verdict"); *Meyerhoff v. Michelin Tire Corp.*, 70 F.3d 1175, 1181 (10th Cir. 1995) (noting that review of decisions on motions for judgment as a matter of law are reviewed *de novo*); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999) (stating "[t]his Court reviews *de novo* a district court's denial of a motion for judgment as a matter of law"); *Odetics, Inc. v. Storage Tech. Corp.*, 185 F.3d 1259, 1266 (Fed. Cir. 1999) (stating "[w]e review a grant of JMOL without deference to the district court"); *Barwick v. United States*, 923 F.2d 885, 889 (D.C. Cir. 1991) (reviewing denial of judgment as a matter of law *de novo*); *Atchison, Topeka and Santa Fe Ry. Co. v. Chevron U.S.A., Inc.*, 896 F.2d 561, 562 (Temp. Emer. Ct. of App. 1989) (stating "[a]ppellate review of a district court's grant of a motion for a directed verdict is *de novo*").

[24] *See, e.g., Dragon v. Rhode Island*, 936 F.2d 32, 36 (1st Cir. 1991) (stating that the court "must look at all the evidence submitted, that which favors the defendant as well as the plaintiff. If the record, as a whole, permits only one reasonable

Finally, this Court's decision in *Anderson*, standing alone, forecloses petitioners arguments as to what

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conclusion, the judge must enter a directed verdict"); *Piesco v. Koch*, 12 F.3d 332, 343 (2nd Cir. 1993) (reviewing both parties' evidence to determine propriety of trial court's denial of judgment as a matter of law); *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3 120, 129 (3rd Cir. 1998) (noting that standards for summary judgment and directed verdict are the same and the ultimate question is whether reasonable minds may differ as to the verdict based upon the evidence presented"); *Sales v. Grant*, 158 F.3d 768, 775 (4th Cir. 1998) (noting that directed verdict is proper if there is only one conclusion a reasonable jury could draw from the evidence presented); *Aetna Cas. & Sur. Co. v. Pendleton Detectives of Mississippi, Inc.*, 182 F.3d 376, 377-78 (5th Cir. 1999) (stating that court must review "the entire record" in the light most favorable to the plaintiff to determine whether or not to grant judgment as a matter of law); *Snyder v. AG Trucking, Inc.*, 57 F.3d 484, 490 (6th Cir. 1995) (affirming grant of judgment as a matter of law after reviewing the evidence presented by both parties); *Klunk v. County of St. Joseph*, 170 F.3d 772, 775 (7th Cir. 1999) (quoting *Anderson* for the proposition that judgment as a matter of law is appropriate where the evidence "is so one-sided that one party must prevail as a matter of law"); *Steckstor v. Hancock*, 984 F.2d 274, 276 (8th Cir. 1993) (citing *Anderson* for the proposition that judgments as a matter of law are appropriate where the evidence "is so one-sided that one party must prevail as a matter of law"); *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (citing *Anderson* for the proposition that judgment as a matter of law is appropriate "where the evidence is so one-sided that one party must prevail as a matter of law"); *Meyerhoff v. Michelin Tire Corp.*, 70 F.3d 1175, 1181 (10th Cir. 1995) (stating that "[j]udgment as a matter of law is appropriate only if the evidence . . . points but one way and is susceptible to no reasonable inferences supporting the nonmoving party"); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999) (quoting *Anderson* for the proposition that judgment as a matter of law is appropriate where the evidence "is so one-sided that one party must prevail as a matter of law"); *Odetics, Inc. v. Storage Tech. Corp.*, 185 F.3d 1259, 1269 (Fed. Cir. 1999) (noting that trial court, when presented with a motion for

evidence is reviewed and under what standard. In *Anderson*, this Court wrote:

> As the Court long ago said in *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L.Ed. 867 (1872), and has several times repeated:
>
> > Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. (Footnotes omitted.)
>
> See also *Pleasants v. Fant*, 22 Wall. 116, 120-121, 22 L.Ed. 780 (1875); *Coughran v. Bigelow*, 164 U.S. 301, 307, 17 S.Ct. 117, 119, 41 L.Ed. 442 (1896);

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judgment as a matter of law, must consider *all* of the evidence); *Barwick v. United States*, 923 F.2d 885, 889 (D.C. Cir. 1991) (noting that trial court, when presented with a motion for judgment as a matter of law, must consider *all* of the evidence *available*); *Atchison, Topeka and Santa Fe Ry. Co. v. Chevron U.S.A., Inc.*, 896 F.2d 561, 562 (Temp. Emer. Ct. of App. 1989) (citing *Anderson* for the proposition that judgment as a matter of law is appropriate where the evidence "is so one-sided that one party must prevail as a matter of law").

Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 343, 53 S.Ct. 391, 394, 77 L.Ed. 819 (1933).

The Court has said that summary judgment should be granted where the evidence is such that it "would require a directed verdict for the moving party." *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624, 64 S.Ct. 724, 727, 88 L.Ed. 967 (1944). And we have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard: "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745, n. 11, 103 S.Ct. 2161, 2171, n. 11, 76 L.Ed.2d 277 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Progressing to the specific issue in this case, we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position

> will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict – "whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Munson, supra,* 14 Wall., at 448.

Anderson, at 251-52. Clearly, a court cannot determine whether there is a genuine issue of material fact or whether the evidence is entirely one-sided without looking at the evidence as a whole.

III. THE REQUIREMENT THAT A COURT CONSIDER ALL THE EVIDENCE, NOT JUST THE EVIDENCE FAVORABLE TO THE NON-MOVING PARTY, APPLIES TO BOTH MOTIONS FOR SUMMARY JUDGMENT AND MOTIONS FOR JUDGMENT AS A MATTER OF LAW.

As outlined in part II, *supra,* a court should consider all of the evidence when determining whether to grant summary judgment. This same evidentiary standard applies to both motions for summary judgment and motions for judgment as a matter of law. The requirement that such standards be applied throughout a case, i.e., at the summary judgment stage, throughout the trial itself, and at the time of a motion for judgment as a matter of law after the trial, was made clear by this Court in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986).

Anderson was a libel suit in which the Court of Appeals had found that the evidentiary requirement of *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80 (1964), holding that a plaintiff claiming libel must show "clear-and-convincing-evidence" of actual malice, was not applicable at the summary judgment stage. *Anderson,* 477

U.S. at 244, 106 S. Ct. at 2508. This Court reversed that finding, concluding that "the determination of whether a given factual dispute requires submission to a jury **must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages.**" *Id.,* 477 U.S. at 255, 106 S.Ct. at 2514 (emphasis added); *accord Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The *Anderson* Court reasoned:

> [I]n ruling on a motion for summary judgment, the judge must view the evidence presented **through the prism of the substantive evidentiary burden.** This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find either that the plaintiff provided his case **by the quality and quantity of evidence required by the governing law or that he did not.** Whether a jury could reasonably find for either party, however, cannot be defined **except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant:** It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and **these standards and boundaries are in fact provided by the applicable evidentiary standards.**

Id., 477 U.S. at 254, 106 S. Ct. at 2513 (emphasis added). With this reasoning, the *Anderson* Court held that the Court of Appeals had not applied the correct standard in reviewing the District Court's grant of summary judgment and, thus, vacated that decision and remanded the case. *See id.,* 477 U.S. at 257, 106 S. Ct. at 2514-15.

This is consistent with the Federal Rules of Civil Procedure themselves. Rule 56 requires a granting of summary judgment where "there is no genuine issue as to any material fact and that the moving party is entitled

to a judgment as a matter of law." Fed. R. Civ. P. 56. The 1991 amendment of Fed. R. Civ. 50 abandoned the terminology "direction of verdict" to adopt the term "judgment as a matter of law" to "call[ ] attention to the relationship between the two rules." Fed. R. Civ. P. 50 advisory committee's notes. Additionally, the advisory committee noted that, wi[illegible]egard to motions made under Fed. R. Civ. P. 50:

> The expressed standard makes clear that action taken under the rule is a performance of the court's duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment or any other provision of federal law. Because this standard is also used as a reference point for entry of summary judgment under 56(a), it **serves to link the two related provisions**.
>
> The revision authorizes the court to perform its duty to enter judgment as a matter of law **at any time during the trial**, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to that party's case. . . .

Fed. R. Civ. P. 50 advisory committee's notes (emphasis added).

This is exactly what the Fifth Circuit did in the case at bar. The Fifth Circuit performed a plenary review, "considering all the evidence in a light most favorable to Reeves," and found that there was insufficient evidence presented of age discrimination. (Fifth Circuit Op. at 9-10.) Petitioner argues to this Court that the Fifth Circuit's consideration of all of the evidence contradicted *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-53 (1986). (Pet'r Br. at 39.) He asserts that:

> Contradictions between Plaintiff's evidence and Defendant's evidence on material points . . . created issues of material fact. Established summary judgment procedure requires the court to disregard movant's evidence which is contradicted by non-movant's evidence. Contradiction in evidence on material points precludes summary judgment under Rule 56. . . .

(Pet'r Br. at 40.) He then goes on to state that "[t]he contradictions in evidence on material points should have precluded a directed verdict under Rule 50 for the same reason they preclude summary judgment under Rule 56." *Id.*

This backwards logic is in direct contravention of the reasoning outlined in *Anderson v. Liberty Lobby*. There, this Court recognized that the "inquiry involved in a ruling on a motion for summary judgment or for a directed verdict **necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits**." *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512 (emphasis added). It is not a mere contradiction in evidence or whether the evidence "unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented" which is the proper issue for the court to determine with either motion. *Id.*

This was the standard applied by the Fifth Circuit. *See* Fifth Circuit Op. at 5 (holding district court's judgment would be reversed where " 'there is no legally sufficient evidentiary basis for a reasonable jury to find' that Sanderson discharged Reeves because of his age"). In weighing the sufficient evidentiary basis for a verdict, the Fifth Circuit correctly applied the underlying substantive law as mandated by *Anderson* and outlined in *Hicks:* "plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination 'had a determinative influence on' the employer's decision-making process." (Fifth Circuit Op. at 6).

Thus, it is clear that *Anderson* directs that, just as that plaintiff was required to meet the evidentiary standards for a libel claim at the summary judgment stage, the substantive law of *Hicks* must be applied throughout a

discrimination case: at the motion for summary judgment stage and when considering motions for judgment as a matter of law, whether made during or after trial. Plaintiff must be required to prove the substantive elements of his claim no matter what the timing of the dispositive motion. Employers who are faced with a claim for discrimination should not be required to go to a jury when the employee can evidence no illegal determinative influence on the employer's decisions. Adhering to *Anderson*, this Court should rule that the substantive evidentiary standards of *Hicks* must be applied at both the summary judgment and motion for judgment as a matter of law stages.

CONCLUSION

For the foregoing reasons, ARA respectfully requests that this Court affirm the Fifth Circuit's decision in favor of the Respondent.

Respectfully submitted,

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